228.

SUPREME COURT OF THE UNITED STATES.

No. 180.

GEORGE RUNDLE AND WILLIAM GRIFFITHS, TRUSTEES OF THE ESTATE OF JOHN SAVAGE, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE DELAWARE AND RARITAN CANAL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

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GIDEON, printer.

In the circuit court of the United States, for the third circuit and district of New Jersey.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the [L. S.] circuit court of the United States, for the third circuit and district of New Jersey, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between George Rundle and William Griffiths, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, plaintiffs, and the Delaware and Raritan Canal Company, a corporation created by the State of New Jersey, and exercising its powers within the said State, defendants, manifest error hath intervened to the damage of the said plaintiffs, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things touching and concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the sixty-fourth.

P. D. VROOM, *Att'y.*
EW'D N. DICKERSON,
Clerk circuit court U. S., N. Jersey.

Know all men by these presents, that we, George Rundle and William Griffiths, of the State of Pennsylvania, are held and firmly bound unto the Delaware and Raritan Canal Company in the sum of two hundred dollars, to be paid to the said the Delaware and Raritan Canal Company, or their assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the nineteenth day of December, in the year of our Lord one thousand eight hundred and forty-nine.

Whereas the above named George Rundle and William Griffiths, as

trustees of the estate of John Savage, deceased, have prosecuted a writ of error to the Supreme Court to reverse the judgment rendered in the above entitled suit, by the circuit court of the United States, for the third circuit and district of New Jersey. Now, therefore, the condition of this obligation is such, that if the above named George Rundle and William Griffiths shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. RUNDLE, [L. S.]
WM. GRIFFITHS. [L. S.]

Sealed and delivered in presence of—
JOHN W. ASHMEAD,
JOHN BROADHEAD.

(Endorsed.) I am satisfied with the execution of the above bond by Mess. Rundle and Griffiths, as their personal security is amply sufficient without additional name.

JOHN M. READ,
For Del. & Rar. Canal Co.

Allowed: PH. DICKERSON, *Judge.*
Filed January 1, 1850.

I, Edward N. Dickerson, clerk of the circuit court of the United States, for the third circuit and district of New Jersey, do hereby certify that the record of proceedings hereunto annexed is a true copy of the originals on file in this office, in a suit between George Rundle and William Griffiths, trustees of John Savage, deceased, plaintiffs, and the Delaware and Raritan Canal Company, defendant.

In testimony whereof I have hereunto set my hand and seal of office, this first day of January, A. D. 1850.
[SEAL.]

EDW. N. DICKERSON.
Clerk cir. court, U. S., New Jersey.

Circuit court of the United States, for the third circuit, New Jersey district, of the first day of October, in the year of our Lord one thousand eight hundred and forty-seven, (1847.)

DISTRICT OF NEW JERSEY, *ss.*

George Rundle and William Griffiths, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, (the said John Savage being also a citizen of said State at the time of his decease,) complain of "The Delaware and Raritan Canal Company," a corporation created by the State of New Jersey, and exercising its powers within the said State, for this, to wit: That whereas the said George Rundle and William Griffiths, trustees as aforesaid, before and at the time of committing of the grievances by the said "The Delaware and Raritan Canal Company" hereinafter next mentioned, were, and from thence hitherto have been, and still are, lawfully seized of certain mills,

manufacturing establishments, and real estate, with their appurtenances and privileges, of the value of more than five hundred dollars, situate, lying, and being on and adjacent to the river Delaware, in the county [of] Bucks, and State of Pennsylvania; which said mills and manufacturing establishments derive their supply of water from the said river Delaware, which runs and flows between the States of Pennsylvania and New Jersey, and is a boundary of said States, and over which the said States have concurrent jurisdiction. And by reason thereof the said plaintiffs, before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of the said river, which, during all that time, of right ought to have run and flowed; and till the diversion thereof hereinafter mentioned of right had run and flowed, and still of right ought to run and flow, into the said mills and manufacturing establishments of the said plaintiffs for the supplying of the same with water.

Yet the said defendants, well knowing the said premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to hinder and prevent them from carrying on their said mills and manufacturing establishments in so ample and beneficial a manner as they had theretofore done, and of right ought to have done, and to disturb them in the enjoyment of their said mills and manufacturing establishments, and to damnify them in the same, to wit, on the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-two, and on divers other days and times between that day and the time of the commencement of this suit, to wit, at Trenton, in the district of New Jersey aforesaid, wrongfully and injuriously erected, and caused and procured to be erected, in, over, and across the said river Delaware, above the mills and manufacturing establishments of the said plaintiffs a certain weir or dam of the height of ten feet, and of the length of one-half a mile; and wrongfully and injuriously kept and continued the same, so erected, for a long space of time, to wit, from thence hitherto, and thereby and therewith wrongfully and injuriously penned up and obstructed the water of the said river, and prevented the same from flowing down to the mills and other works of the said plaintiffs in as ample and beneficial a manner as the same otherwise would have flowed; in consequence whereof the plaintiffs were prevented from using their said mills and manufacturing establishments as they otherwise would have done, and as the same were formerly used before the erection of the said dam or obstruction, and lost great gain and profits, which but for said obstruction they would have made, and were obliged to lay out large sums of money in widening and deepening that portion of the river through which the water runs for the supply of their said mills and other manufacturing establishments of the said plaintiffs, to wit, at Trenton aforesaid.

And whereas, also, the said George Rundle and William Griffiths, trustees as aforesaid, before and at the time of committing the grievances by the said defendants herein after mentioned were, and from thence

hitherto have been, and still are, lawfully seized of certain other mills and manufacturing establishments, with their appurtenances and privileges, of the value of more than five hundred dollars, situate, lying, and being on and adjacent to the river Delaware aforesaid, in the county of Bucks aforesaid, which said mills and manufacturing establishments derive their supply of water from the said river Delaware, which runs between and towards the two States of Pennsylvania and New Jersey, and over which the said States have concurrent jurisdiction. And by reason thereof the said plaintiffs, before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of said river, which during all that time of right ought to have run and flowed, and until the diversion thereof, hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow, unto the said mills and other works of the said plaintiffs for supplying the same with water. Yet the said defendants, well knowing the said premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to prevent them from carrying on their mills and manufacturing establishments in so ample and beneficial a manner as they had theretofore done, and to disturb them in the enjoyment of their said mills and other manufacturing establishments, and to damnify them in the same, to wit, on the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-two, and on divers other days, and being between that day and the time of the commencement of this suit, to wit, at Trenton, in the district of New Jersey aforesaid, wrongfully and injuriously cut, dug, excavated, and made, and caused to be cut, dug, excavated, and made, in and out of the northerly side or bank of the said stream or river, above the works or mills of the said plaintiffs, one sluice or canal of great depth, and width, and length, to wit, of the depth of ten feet, and of the width of eighty feet, and the length of thirty miles, and kept and continued, and caused to be kept and continued, the said sluice or canal on the said northerly side or bank of the said river for a long space of time, to wit, from thence hitherto; and thereby, during all that time, wrongfully and unlawfully, diverted and turned divers large quantities of the water of the said river out of and away from the said mills and other manufacturing establishments of the said plaintiffs, and stopped, prevented, and hindered the water of the said stream or river from running or flowing along its usual course to the said mills, and from supplying the same with water for the necessary working thereof, as the same of right ought to have done and otherwise would have done; and took and used the said water thus diverted as aforesaid, as well to fill and supply the said sluice or canal, as to supply with the said water divers grist mills, saw mills, factories, and other manufacturing establishments, for the sake of compensation and profit, deriving therefrom great emolument and gain.

And by reason thereof the water of the said river, sufficient for the supplying of the said mills of the said plaintiffs during all or any part of that time, could not nor did run or flow to the same, as of right it

ought to have done; and the said plaintiffs thereby, for want of such sufficient water, could not during that time use their said mills and other manufacturing establishments, in so large, extensive, and beneficial a manner as they might and otherwise would have done, but were thereby, during all that time, deprived of the use and enjoyment of the said mills and other works, and of all the profits, benefits, gains, and other advantages which they otherwise might and would have made by the same, to wit, at Trenton aforesaid.

And whereas, also, the said plaintiffs before and at the time of committing the grievances by the said defendants hereinafter mentioned, now, and from thence hitherto have been, and still are, lawfully seized of certain other mills and manufacturing establishments, with their appurtenances and privileges, of the value of more than five hundred dollars, situate on and adjacent to the bank of the river Delaware, in the county of Bucks aforesaid, which said mills and manufacturing establishments derive their supply of water from the said river Delaware, which said river runs between and bounds the two States of Pennsylvania and New Jersey, and over which the said States have concurrent jurisdiction, and the said plaintiffs were entitled to the use of the water in the said river Delaware for the supply and support of their said mills and other manufacturing establishments, the water of which said river hath flowed, and ought to have flowed, and hath for a long period, until the obstruction and diversion hereinafter mentioned, flowed in its ancient and accustomed channel, without any obstruction or diversion, to the mills and other works of the said plaintiffs.

Yet the said defendants, well knowing the premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the use and enjoyment of the water of the said river, and to damnify them in the same, to wit, in the day and year aforesaid, at Trenton, in the district of New Jersey aforesaid, wrongfully and injuriously erected and made, and caused and procured to be erected and made, on, over, and across the said river, above the said mills and other works of the said plaintiffs, a certain weir, or dam, or obstruction of earth, wood, stone, gravel, and other materials, of the height of ten feet, and of the length of one-half a mile, and wrongfully and injuriously kept and continued the same so erected and made for a long space of time, to wit, from thence hitherto; and then and there wrongfully and injuriously cut, dug, excavated, and made, and caused to be cut, dug, excavated, and made, in and out of the northerly side or bank of the said river or stream, above the said mills and works of the said plaintiffs, one sluice or canal of great depth, and width, and length, to wit, of the depth of ten feet, and of the width of eighty feet, and of the length of thirty miles; and caused to be kept and continued *and kept and continued* the said sluice or canal on the said northerly side or bank of the said river for a long space of time, to wit, from thence hitherto, and thereby, and by means of the said weir, dam, or obstruction, so erected and made in, over, and across the said river, and by means of the said sluice or canal so dug and constructed as aforesaid, the said de-

fendants, for a long space of time, to wit, from thence hitherto, have unlawfully, wrongfully, and injuriously penned up and obstructed the water of the said river, and unlawfully and wrongfully diverted divers large quantities of water of the said river out of their accustomed and proper channel or course, and out of and away from the said mills and other manufacturing establishments of the said plaintiffs, and prevented the same from flowing down to the said mills and other works of the said plaintiffs in as ample and beneficial a manner as the same otherwise would have flowed; and took and used the said water thus diverted as aforesaid, as well to fill and supply the said sluice or canal, as to supply with the said water divers grist-mills, saw-mills, factories, and other manufacturing establishments, for the sake of compensation and profit, deriving therefrom great emolument and gain; in consequence whereof the plaintiffs were prevented from using the said mills and other works as they otherwise would have done, and lost great profits for the want of the supply of water which they were of right entitled to have, and otherwise would have had, and were obliged to lay out and expend divers large sums of money in widening and deepening that portion of the river through which the water was accustomed to run for the supply of the said mills and other manufacturing establishments of the said plaintiffs, to wit, at Trenton aforesaid.

And whereas, also, the said plaintiffs, before and at the time of the committing the grievances by the said defendants hereinafter mentioned, were, and from thence hitherto have been, and still are, lawfully seized of certain other mills, manufacturing establishments, and real estate, with the appurtenances, of the value of more than five hundred dollars, situate on and adjacent to the bank of the river Delaware, in the county of Bucks aforesaid; which said mills and manufacturing establishments derive their supply of water from the river Delaware, which runs between, and is a boundary of, the two States of Pennsylvania and New Jersey, and over which the said States have concurrent jurisdiction; and as such owners were entitled to the use of the water of the said river Delaware for the support of their said mills and manufacturing establishments, as the same had theretofore flowed, and ought to have flowed, in its ancient and accustomed course, without any obstruction, to the mills and other works of the said plaintiffs.

Yet the said defendants, well knowing the premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the use and enjoyment of the said water of the said river, and to damnify them in the same, to wit, on the day and year last aforesaid, at Trenton aforesaid, in the district aforesaid, wrongfully and injuriously erected, and caused and procured to be erected, in, over, and across the said river, above the said mills and works of the said plaintiffs, a certain weir or dam of the height of ten feet, and of the length of one-half mile; and also placed, and caused to be placed, in the said river, and above the mills and other works of the said plaintiffs, divers large quantities of stone, timber, and other materials, and wrongfully and injuriously kept and continued the same so erected and placed for a long

space of time, to wit, from thence hitherto. And then and there wrongfully and injuriously cut, dug, and made, and caused to be cut, dug, and made, in and out of the northerly side or bank of the said stream or river Delaware, above the works of the said plaintiffs, and commencing at or near the said dam, so that the waters of the said stream might flow therein, one sluice, cut, or canal of great depth, width, and length, to wit, of the depth of ten feet, and of the width of one hundred feet, and of the length of thirty miles; and did also cut, dig, and continue or extend the said sluice or canal beyond the said northerly side or bank of said stream northwardly for a great distance, to wit, for the distance of fifty miles; and southwardly for a great distance, to wit, for the distance of ten miles; and have wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluice or canal so cut and dug as aforesaid, for a long space of time, to wit, from thence hitherto. And also in cutting, digging, and erecting the said canal on the said northerly bank of the said stream or river Delaware, above the works and mills of the said plaintiffs, divers streams and brooks, to wit, twenty streams and twenty brooks, which always theretofore had run and emptied themselves into the said river Delaware, and been tributary thereto, did altogether divert and cut off, so that the same were, and from thence hitherto have been, altogether hindered and prevented from flowing into the said river as they had always theretofore been accustomed to do.

And also at or near the head or commencement of the said sluice or canal, and where the same receives its supply of water from the said river Delaware, and immediately above the said dam or obstruction so created as aforesaid, did dig out and excavate, and cause to be dug out and excavated, to a great depth, to wit, to the depth of twelve feet, the bed of the said river or stream, and thereby turned and diverted a large quantity of the water of said stream into the said sluice or canal, and have continued the same from thence hitherto, to wit, at Trenton aforesaid, in the district aforesaid; whereby and by means of the said premises the said defendants, for a long space of time, to wit, from thence hitherto, have unlawfully and wrongfully diverted and turned divers large quantities of water of the said river out of the same, and away from the said mills and manufacturing establishments, and other property of the said plaintiffs, and prevented the same from flowing down to the mills and other works of the said plaintiffs, in as ample and beneficial a manner as the same would otherwise have flowed. And have unlawfully and injuriously taken and used the said water, so diverted as aforesaid, as well for the purposes of a certain canal constructed by the said defendants, as for the erection of a water power from which they have supplied, and still do supply, various mills, manufactories, and other establishments with water, for compensation and gain, deriving therefrom great emolument and profit; in consequence whereof the said plaintiffs have, and from thence hitherto have been prevented from using their mills and other works as they otherwise would have done, and have lost great profits for want of the supply of

water, which they were of right entitled to have; and were obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, the sum of ten thousand dollars, in widening and deepening that portion of the river or stream through which the water was accustomed to run and flow for the supply of the said mills and other manufacturing establishments, and real estate and property of the said plaintiffs, to wit, at Trenton aforesaid.

And whereas, also, the said plaintiffs, before and at the time of the committing of the grievances by the defendants hereinafter mentioned, were, and from thence hitherto have been, and still are, lawfully seized of certain other mills, water works, manufacturing establishments, and real estate, with the appurtenances, of the value of more than five hundred dollars, situate, lying, and being on or adjacent to the river Delaware, in the county of Bucks aforesaid, as assignees of one Robert Hoops, late of the said county of Bucks, and as such assignees were entitled by the permission, authority, and grant, as well of the State of Pennsylvania as of the State of New Jersey, to use the water of the said river Delaware, for the supply and benefit of the said mills and water works, and for that purpose to maintain, raise, or repair a certain dam erected by the said Adam Hoops in the said river Delaware, between his plantation and an island in the said river, nearly opposite to the city of Trenton, which river runs and flows between the said States of Pennsylvania and New Jersey, and is a boundary of said States, and over which the said two States have concurrent jurisdiction; and by reason thereof the said plaintiffs, before and at the time of committing of the grievances hereinafter mentioned, of right had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of the said river, which during all that time ought to have run and flowed, and till the diversion thereof hereinafter mentioned of right had run and flowed, and still of right ought to run and flow, unto the said mills and water works of the said plaintiffs, for the supply of the same with water, as well by the natural flow and current of the said river, as by the erection and maintenance of the said dam, to wit, at Trenton aforesaid, in the district of New Jersey aforesaid. Yet the said defendants, well knowing the premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the use and enjoyment of the said water of the said river, and to damnify them in the same, to wit, on the day and year last aforesaid, at Trenton aforesaid, in the district aforesaid, wrongfully and injuriously erected, and caused and procured to be erected, in, over, and across the said river, above the said mills and works of the said plaintiffs, a certain weir or dam of the height of ten feet, and of the length of one half mile; and also placed and caused to be placed in the said river, and above the mills and other works of the said plaintiffs, divers large quantities of stone, timber, and other materials, and wrongfully and injuriously kept and continued the same, so erected and placed, for a long period of time, to wit, from thence hitherto, and then and there

wrongfully and injuriously cut, dug, and made, in or out of the said northerly side or bank of the said stream or river Delaware, above the works of the said plaintiffs, and commencing at or near the said dam, so that the waters of the said stream might flow therein, one sluice, cut, or canal of great depth, width, and length, to wit, of the depth of ten feet, and of the width of one hundred feet, and of the length of thirty miles; and did also cut, dig, and continue, or extend, the said sluice or canal beyond the said northerly side or bank of said stream northwardly for a great distance, to wit, for the distance of fifty miles, and southwardly for a great distance, to wit, for the distance of ten miles; and have wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluice or canal so dug and cut as aforesaid, for a long space of time, to wit, from thence hitherto; and also in cutting, digging, and erecting the said canal on the said northerly bank of the said stream or river Delaware, above the works and mills of the said plaintiffs, divers streams and brooks, to wit, twenty streams and twenty brooks, which always theretofore had run and emptied themselves in the said river Delaware, and been tributary thereto, did altogether divert and cut off, so that the same were, and from thence hitherto have been, altogether hindered and prevented from flowing into the said river as they had always theretofore been accustomed to do. And also at or near the head or commencement of the said sluice or canal, and where the same receives its supply of water from the said river Delaware, and immediately above the said dam or obstruction so created as aforesaid, did dig out and excavate, and cause to be dug out and excavated, to a great depth, to wit, to the depth of twelve feet, the bed of the said river or stream, and thereby turned and diverted a large quantity of the water of said stream into the said sluice or canal, and have continued the same from thence hitherto, to wit, at Trenton aforesaid, in the district aforesaid.

Whereby, and by means of the said premises, the said defendants for a long space of time, to wit, from thence hitherto, have wrongfully and unlawfully diverted and turned divers large quantities of water of the said river out of the same, and away from the said mills and manufacturing establishments and other property of the said plaintiffs, and prevented the same from flowing down to the mills and other works of the said plaintiffs in as ample and beneficial a manner as the same would otherwise have flowed; and have unlawfully and injuriously taken and used the said water, so diverted as aforesaid, as well for the purposes of a certain canal constructed by said defendants, as for the erection of a water power, from which they have supplied, and still do supply, various mills, manufactories, and other establishments with water for compensation and gain, deriving therefrom great emolument and profit; in consequence whereof the said plaintiffs were, and from thence hitherto have been, prevented from using their said mills and other works as they otherwise would have done, and have lost great profits for want of the supply of water which they were of right entitled to have, and were obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, the sum of ten thousand

dollars, in widening and deepening that portion of the river or stream through which the water was accustomed to run and flow for the supply of the said mills and other manufacturing establishments, and real estate and property of the said plaintiffs, and in maintaining and repairing the said dam so erected as aforesaid by the said Adam Hoops, to wit, at Trenton aforesaid. Wherefore the said plaintiffs say, that they are injured and have sustained damage to the amount of one hundred thousand dollars, and thereof they bring suit.

P. D. VROOM,
Atty. of Plaintiffs.

DISTRICT OF NEW JERSEY, *ss.*

George Rundle and William Griffiths, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, put in their place Peter D. Vroom, their attorney, against the Delaware and Raritan Canal Company, or corporation, created by the State of New Jersey, and exercising its powers within the said State, in a plea of trespass on the case.

Filed November 8th, 1847. Pleas and demurrer.

The DELAWARE AND RARITAN CANAL COMPANY, defendants, ads. GEORGE RUNDLE and William Griffith, trustees of the estate of John Savage, deceased, plaintiffs.

And the said defendants, by James S. Green, their attorney, come and defend the wrong and injury, when, &c., and say, that they are not guilty in manner and form as the said plaintiffs have in the first, second, third, and fourth counts of their declaration above complained against them, and of this they put themselves upon the country.

And for further plea in this behalf, the said defendants, by leave of the court for this purpose here first had and obtained, according to the form of the statute in such case made and provided say, that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say, that by virtue of an act of the legislature of the State of New Jersey, entitled "an act to incorporate the Delaware and Raritan Canal Company, passed the fourth day of February in the year of our Lord one thousand eight hundred and thirty, and the supplement thereto passed the third day of February, eighteen hundred and thirty-one, they constructed, made, and erected a canal or artificial navigation from the waters of the Delaware river to the waters of the Raritan river, and supplied the said canal with water from the Delaware river by the construction of a feeder, forming a navigable canal; and in the construction, making, and execution of all the works, devices, dams, weirs, and sluices, necessary for the use of the said canal and feeder, and in locating the same, the said defendants did, to the mills, manufacturing

establishments, and real estate, with the appurtenances and privileges, of the plaintiffs no unnecessary damage; but the said canal and feeder, with the works, devices, dams, weirs, and sluices, of which the weir, dam, sluice, canal, cut, and excavation mentioned in the first, second, third, and fourth counts of the plaintiffs' declaration are a part, have been made and completed in the most prudent and skilful manner, under, by virtue of, and in pursuance of, the said acts of the legislature of the State of New Jersey for a public highway, and without any design to injure the property of the said plaintiffs; and the defendants aver, that the said Delaware river is a navigable river, and a public highway, and from time immemorial has been so esteemed and used, and at all times been subject to legislative action, and been considered under the servitude of the public, and of public use for the carriage of boats, produce, and merchandise; and these defendants further aver, that the navigation of the said Delaware river has been improved by the creation and completion of the said canal and feeder, and the facilities of trade and intercourse have been increased thereby; and the said canal and feeder have been used, since the first day of May, one thousand eight hundred and thirty-four, as a public highway, free for the transportation of passengers, and of goods, commodities, and merchandise, and produce, on the payment of the established tolls, under, by virtue of, and in pursuance of the acts of the legislature of the State of New Jersey aforesaid; so these defendants say that the acts complained of in the first, second, third, and fourth counts of plaintiffs' declaration were lawful acts, and that the injury complained of, if any, by the plaintiffs, arises from the construction and completion of works done by the authority of the State of New Jersey, as expressed in their said act of incorporation and supplement thereto, and are not the subject matter of an action at law; and this these defendants are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them.

And for a further plea in this behalf the said defendants, by leave of the court for this purpose here first had and obtained, according to the form of the statute in such case made and provided, say, that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, they say, that the weir, dam, sluice, canal, cut, and excavation mentioned and complained of in the first, second, third, and fourth counts of the declaration of the plaintiffs, were made, done, and completed by the defendants, as corporators of the said corporation created by the State of New Jersey, and exercising their legitimate powers by virtue thereof, and without doing to the property of the plaintiffs any unnecessary damage; and so the said defendants say, that the acts complained of by the plaintiffs in the first, second, third, and fourth counts in their declaration, were done by the defendants under, by virtue of, and in pursuance of the authority of the State of New Jersey, as vested in these defendants by their said act of incorporation and supplement thereto, and are by such authority protected from the said action of the said plaintiffs; and this the said defendants are ready to

verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them.

And for further plea in this behalf the said defendants, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, they say, that the said weir, dam, sluice, canal, cut, and excavation, mentioned and complained of in the first, second, third, and fourth counts of the plaintiffs' declaration, were made, erected, and done by the defendants by virtue of the act of the legislature of New Jersey, entitled "An act to incorporate the Delaware and Raritan Canal Company," passed the fourth day of February, eighteen hundred and thirty, and the supplement thereto, passed the third day of February, eighteen hundred and thirty-one; and the said weir, dam, sluice, canal, cut, and excavation, were finished and completed on the first day of February, eighteen hundred and thirty-eight; and so these defendants say, that the said several supposed causes of action in the said first, second, third, and fourth counts of the plaintiffs' declaration mentioned, did not, nor did any of them, accrue to the plaintiffs at any time within six years next before the commencement of this suit, in manner and form as the said plaintiffs in the said first, second, third, and fourth counts have complained against them, the said defendants; and this they are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their said action against them.

And the said defendants come and defend the wrong and injury, when, &c., and say, that the mills, manufacturing establishments, and real estate, with their appurtenances, in the several counts in the plaintiffs' declaration mentioned, for the supposed injury to which the said action is brought, are not situate, lying, and being within the New Jersey district, or within the jurisdiction of this court, but are situate, lying, and being in the eastern district of the State of Pennsylvania, in which said district there was, at the time of the said supposed grievances, and long before, and at the time of the institution of the plaintiffs' said action, and yet is, a court of competent jurisdiction to try and decide all causes of action arising within the said district. Wherefore, since the said mills, manufacturing establishments, and real estate, in the said plaintiffs' declaration mentioned, are not within the jurisdiction of this court, but in the eastern district of Pennsylvania, the defendants pray judgment if the court here will or ought to have further cognizance of the plea aforesaid.

And the said defendants, by their attorney, James S. Green, come and defend the wrong and injury, when, &c., and say, that the said fifth count of the said declaration of the plaintiffs, and the matter and things therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action thereof against them, the said defendants; and that they, the said defendants, are not bound by the law of the land to answer the same; and this they are ready to verify. Wherefore

for want of a sufficient fifth count in the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiffs may be barred from having and maintaining their aforesaid action thereof against them.

And the said defendants, according to the form of the statute in such cases made and provided, state and show to the court here the following causes of demurrer to the said fifth count of the said declaration, that is to say, that the permission, authority, and grant to one Robert Hoops in the said fifth count mentioned, is not legally and sufficiently set forth, in that the time when the said permission, authority, and grant was given is not mentioned, nor how long the same was to continue.

And also, further, it is not stated in the said fifth count in what year the States of Pennsylvania and of New Jersey, granted to the said Adam Hoops permission and authority to maintain, raise, or repair the dam in the river Delaware erected by him.

And also for that the titles of the acts of the legislatures of Pennsylvania and New Jersey containing the permission, authority, and grant to the said Adam Hoops to maintain, raise, or repair the dam in the river Delaware erected by him, are not set forth in the said fifth count of the said declaration. And also for that it is not stated in the said fifth count whether the permission, authority, and grant to the said Adam Hoops to maintain, raise, and repair the dam erected by the said Adam Hoops in the river Delaware, was by a private or a public act of the legislature of the State of New Jersey, and the legislature of the State of Pennsylvania; if by a private act, then the same ought to have been specially pleaded and set forth; if by a public act, then such reference should have been made to its title and time of its passage, as would have enabled the defendants and the court to have examined its provisions. And for that the said fifth count does not aver, that the said permission, authority, and grant to the said Adam Hoops to maintain, raise, or repair the dam erected by the said Adam Hoops in the said river Delaware, vests in him such exclusive right to so much of the waters of the river Delaware as was sufficient to supply his mills and water works, and restrained the States of New Jersey and Pennsylvania, or either of them, from granting to the defendants, and to others, permission and authority to use the waters of the said river Delaware above the dam so erected by the said Adam Hoops, as such use might divert such water from the mills and water works of the said Adam Hoops.

And also that it is not distinctly set forth in the said fifth count, nor does it sufficiently appear, that the dam of the plaintiffs is of the same height and extent with the dam so maintained, raised, and repaired by the said Adam Hoops; for without this sameness the permission, authority, and grant of the said Adam Hoops, though actually and legally assigned to the plaintiffs, could not give them a right of action against the defendants. And also it does not appear, in any part of the said fifth count of the said declaration, in what manner, and at what time, Robert Hoops, the assignor of the plaintiffs, acquired the right, if any,

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of Adam Hoops to maintain, raise, or repair a certain dam, erected in the river Delaware by the said Adam Hoops. And also it doth not appear, in any part of the said fifth count, by what authority, permission, and grant the said plaintiffs have widened and deepened that portion of the river Delaware through which the water was accustomed to run and flow for the supply of the mills and other manufacturing establishments of the plaintiffs.

And also that, from anything in the said fifth count of the said declaration appearing, the dam of the plaintiffs erected and maintained in the Delaware river, being a navigable river, has been erected and maintained without first obtaining an act of the legislature, and in violation of an act of the legislature of the State of New Jersey, entitled "An act to preserve the navigation of the rivers and creeks within the colony of New Jersey," passed the twentieth day of August, seventeen hundred and fifty-five.

And also it does not appear, in the said fifth count of the said declaration, at what time the said several supposed grievances complained of against the defendants took place; and that the said fifth count of the said declaration is in other respects uncertain, informal, and insufficient.

JAMES S. GREEN,
Att'y of defendants.

DISTRICT OF NEW JERSEY, *ss.*

The Delaware and Raritan Canal Company, a corporation created by the State of New Jersey, and exercising its power in the said State, put in their place James S. Green, their attorney, at the suit of George Rundle and William Griffith, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, in a plea of trespass on the case.

Filed January 25, 1848.

GEORGE RUNDLE and WILLIAM GRIFFITHS, trustees of John Savage, deceased,
vs.
THE DELAWARE AND RARITAN CANAL COMPANY.

Amended fifth count of declaration.

And whereas also heretofore, to wit, on the first day of March, in the year of our Lord one thousand seven hundred and seventy-one, one Adam Hoops, then of the county of Bucks, and province of Pennsylvania, was seized in fee of a certain farm or plantation in said county, adjoining the river Delaware, and opposite to a certain island in said river, which island was nearly opposite to the city of Trenton, in the then province of New Jersey; on which said farm or plantation, at or near the bank of said river, were erected divers mills and water works, then in the enjoyment and use of the said Adam Hoops. And,

for the better supplying said mills and water works with water from the said river, the said Adam Hoops had erected a mill dam in the said river Delaware, between his said farm or plantation and the said island nearly opposite the city of Trenton, as he lawfully might; which said dam in no way obstructed or prevented the free and uninterrupted navigation of said river; and which said river ran and flowed, and still runs and flows, between the then provinces, now States, of Pennsylvania and New Jersey, and was and is a boundary of said States, and over which the said two States have concurrent jurisdiction.

And whereas the legislature or general assembly of the then province of Pennsylvania, on the ninth day of March, in the year of our Lord one thousand seven hundred and seventy-one, passed an act entitled "An act declaring the river Delaware and Lehigh, and parts of the Neshaming creek, as far up as Barmeley's ford, and of the stream called the Lechawaxin, as far up as the falls thereof, common highways, and for improving the navigation in said rivers," and in and by the said act did declare the said river Delaware to be a common highway, for the purposes of navigation up and down the same; and did thereby appoint and constitute certain persons therein named as commissioners to improve the navigation of the said river Delaware, from the lower part of the falls near Trenton to the forks thereof at Easton, with full power and authority to remove any obstructions whatsoever, either natural or artificial, which might or could in any way hinder or impede the navigation in the said river; and did also therein enact that nothing in the said act contained should give any power or authority to the commissioners therein appointed, or any of them, to remove, throw down, lower, or impair, or in any manner to alter, a mill dam erected by Adam Hoops, in the said river Delaware, between his plantation and an island in the said river, nearly opposite to Trenton, nor to obstruct, or in any manner to hinder, the said Adam Hoops, his heirs or assigns, from maintaining, raising, or repairing the said dam, or from taking water out of the said river for the use of the said mills and water works erected as aforesaid.

And whereas, also, the said Adam Hoops, in the said act named, afterwards, and before the twenty-first day of December, in the year of our Lord one thousand seven hundred and seventy-one, to wit, on or about the day of in the said year, departed this life, seized and possessed of the said real estate, mills, and water-works above mentioned, having first duly made and published his last will and testament, in due form of law, to pass real estate in the then province of Pennsylvania, which will bears date on the seventh day of June, one thousand seven hundred and seventy-one, and therein appointed his wife, Elizabeth Hoops, and his sons, Robert Hoops and David Hoops, executors thereof, with full power and authority to sell and dispose of all his estate, real and personal, and to convey and confirm the same to the purchaser or purchasers thereof; which said executors duly proved the said will and took upon themselves the burthen of the execution thereof. And whereas the general assembly of the then

province of New Jersey, on the twenty-first day of December, in the year last aforesaid, passed an act, entitled "an act declaring the river Delaware a common highway, and for improving the navigation in the said river." And in and by said act did declare the said river Delaware to be a common highway, for the purposes of navigation, up and down the same. And did thereby appoint and constitute certain persons therein named as commissioners, to improve the navigation of the said river, with full power and authority to remove any obstructions whatsoever, either natural or artificial, which might or could in any manner hinder or impede the navigation in the said river; and did also therein enact, that nothing in said act contained should give any power or authority to the said commissioners to remove, throw down, lower, impair, or in any manner to alter a mill dam erected by Adam Hoops, then lately deceased, in the said river Delaware, between his plantation and an island in the said river, nearly opposite to Trenton; nor to obstruct or in any manner to hinder the heirs or executors of the said Adam Hoops, or their assigns, from maintaining, raising, or repairing the said dam, or from taking water out of the said river for the use of the said mills and water-works, erected as aforesaid.

By virtue of which said several acts, and of the said last will and testament of the said Adam Hoops, the heirs and executors of the said Adam Hoops and their assigns, became lawfully entitled to the privilege of the said dam, and to maintain, raise, and repair the same for the use of the said mills and water-works, and entitled to the free and uninterrupted enjoyment and privilege of the water of the said Delaware river for the use of the said mills and water-works, and to such additional flow thereof as then was, or at any time afterwards might be, caused by the erection, maintaining, raising, and repairing the said dam, without diminution or alteration by or from the act of the said province, now State, of Pennsylvania, or of the said province, now State, of New Jersey, or of any person or persons claiming under either of them or of any person or persons whomsoever. And whereas the said Elizabeth Hoops, Robert Hoops, and David Hoops, executors as aforesaid of the last will of Adam Hoops, having full power and authority to make sale and conveyance of the said real estate, with the said mills and water-works, and all the rights, privileges and appurtenances thereto belonging, afterwards, on or about the tenth day of April, in the year of our Lord one thousand seven hundred and seventy-three, sold and by deed conveyed the same in fee simple to Richard Downing; and the said Richard Downing being seized of the same, afterwards, on the first day of June, one thousand seven hundred and seventy-six, with Mary, his wife, sold and by deed conveyed in fee simple, the one fourth part of the said premises to one Richard Thomas, and also on the same first day of June, one thousand seven hundred and seventy-six, sold and by deed conveyed in fee simple the one other undivided fourth part thereof to Daniel Trimble. And afterwards by deed, being date on the ninth day of May, one thousand seven hundred and eighty-two,

the said Richard Downing and Mary, his wife, Daniel Trimble and Richard Thomas and Thomasine, his wife, sold and conveyed in fee simple, the whole of the said premises to James Wilson and Mark Bird, which said James Wilson and Mark Bird afterwards, on the sixteenth day of August, one thousand, seven hundred and eighty-six, by deed bearing date on that day, sold and conveyed the said premises in fee simple to John Nixon, which said John Nixon afterwards, by deed bearing date on the eighth day of March, one thousand seven hundred and eighty-seven, sold and conveyed the same in fee simple to Samuel Ogden, which said Samuel Ogden afterwards, by deed bearing date on the eleventh day of December, one thousand seven hundred and eighty-nine, sold and conveyed the same in fee simple to Robert Morris.

And the said premises were afterwards, by virtue of an execution against the said Robert Morris and his estate, sold with sundry other tracts of land and real estate of the said Robert Morris, by Daniel Thomas, high sheriff of the county of Bucks, in the State of Pennsylvania, to George Clymer and Thomas Fitzsimons, and by the said sheriff conveyed to one Ebenezer Hazard, at the request of the said purchasers, and by an order of the court of common pleas of Bucks county, out of which court the said execution had issued by deed, bearing date, the eighth day of November, one thousand, seven hundred and ninety-eight; and the said Ebenezer Hazard afterwards by deed of indenture, bearing date on the seventh day of October, one thousand seven hundred and ninety-nine, in which deed the said George Clymer and Thomas Fitzsimons joined, sold and conveyed in fee simple to John Kinsey, Mahlon Milner and Cyrus Cadwalader, the said mills and water-works, with the said island and the said dam which connects the said island with the main land, together with the whole of the creek, and two pieces or parcels of the main land adjoining the said creek at the place called and known as Morrisville, being the whole of the mills and water-works and island, and part of the land late of Robert Morris, deceased, and including that part of the property and estate of which the said Adam Hoops died seized, and which was sold and conveyed by his executors to Richard Downing, with the exception of a small strip or parcel of land along the said river Delaware, not including or connected with the said mills and water-works or the said dam. And the said John Kinsey afterwards sold, and, by deed of indenture, dated the fifteenth day of May, one thousand eight hundred and one, conveyed in fee simple to Joseph Taylor and Oliver Hough, one undivided moiety of his one undivided third part of the said property and estate so conveyed as last aforesaid. And the said Oliver Hough afterwards sold, and, by deed of indenture, dated the twenty-ninth day of December, one thousand eight hundred and three, with Phebe, his wife, conveyed in fee simple to John Stapler and Thomas Stapler, an undivided moiety of his undivided sixth part of the said last mentioned premises. And the said John Stapler afterwards sold, and, by deed of indenture, dated the twenty-sixth day of May, one thousand eight hundred and five, with Hannah, his wife, conveyed in fee simple to Thomas Stapler, the undivided moiety of him, the said John Stapler, whereby the said

Thomas Stapler became seized in fee of the one undivided twelfth part of the said premises. And the said John Kinsey afterwards sold, and, by deed of indenture, dated the first day of April, one thousand eight hundred and six, conveyed in fee simple to one William Warner the undivided sixth part of him, the said John Kinsey, of and in the said premises.

And the said Cyrus Cadwalader afterwards sold, and, by deed of indenture, dated the first day of April, one thousand eight hundred and two, with Mary, his wife, conveyed in fee simple to John Stapler and Thomas Stapler, an undivided sixth part, being a moiety of his undivided third part in said premises. And the said Cyrus Cadwalader afterwards sold, and, by deed of indenture, dated the first day of December, one thousand eight hundred and two, with Mary, his wife, conveyed in fee simple to John Longstreth another undivided sixth part, being the moiety of an undivided third part of said premises. And afterwards, to wit, on the sixteenth day of October, one thousand eight hundred and nine, Mahlon Milner, being seized of an undivided one-third part of said premises, and Joseph Taylor being seized of an undivided twelfth thereof, and John Stapler being seized of an undivided one twelfth part thereof, and Thomas Stapler being seized of two undivided twelfth parts thereof, and John Longstreth being seized of two undivided twelfth parts thereof, and William Warner being seized of the remaining two undivided twelfth parts thereof, did sell, and, by deed of indenture, bearing date the day and year last aforesaid, with their respective wives, that is to say, Mahlon Milner and Phebe, his wife, Joseph Taylor and Mary, his wife, John Stapler and Hannah, his wife, Thomas Stapler and Achtah, his wife, John Longstreth and Esther, his wife, and William Warner and Letitia, his wife, did convey in fee simple the said premises to John Baptist Sartori; and the said John Baptist Sartori, being seized of the said premises, sold, and, by deed, bearing date the twenty-first day of May, one thousand eight hundred and twelve, with Henrietta, his wife, conveyed the same in fee simple to Victor Moreau; and the said Victor Moreau, being seized in fee of the said premises, afterwards, and on or about the — day of ——, one thousand eight hundred and fifteen, departed this life, having first made and executed his last will and testament, and thereby constituted and appointed John S. Roulet, his executor; which said executor, by virtue of said will, and of an act of the legislature of the State of Pennsylvania, passed the fifth day of March, one thousand eight hundred and sixteen, entitled "An act to enable John S. Roulet, executor of the last will and testament of Victor Moreau, deceased, to sell and convey certain real estate therein mentioned;" and which said act authorized the sale of the above mentioned premises, did, by deed dated the twelfth day of September, one thousand eight hundred and sixteen, sell and convey in fee simple the said premises to James Van Uxen and John Baptist Sartori; and the said John S. Roulet, executor as aforesaid, having afterwards obtained a judgment against the said James Van Uxen and John B. Sartori, in the circuit court of the United States for the eastern district of Pennsylvania, and

execution having issued thereon, the said premises were sold by John Conard, marshal of said district, by virtue of said judgment and execution, to John Savage. And by deed dated the twentieth day of January, one thousand eight hundred and twenty-three, conveyed by the said marshal to the said John Savage; and the said John Conard, marshal as aforesaid, by virtue of a writ of pleuries venditioni exponas issued out of the circuit court of the United States for the eastern district of Pennsylvania against the said Robert Morris and one James Nicholson, sold to the said John Savage all their right and interest on the said premises, and conveyed the same to the said John Savage by deed, dated the eighth day of May, one thousand eight hundred and thirty: and the said John Savage, being seized in fee of the said premises as assignee in manner aforesaid of the said Adam Hoops, and of his heirs and executors, departed this life on or about the — day of ——, one thousand eight hundred and thirty-four, having first made and executed his last will and testament in due form of law to pass real estate, and thereof constituted and appointed William Miller, George Rundle, and William J. Bell, executors, and therein gave and devised to his said executors all his estate, real and personal, in trust for the purposes of his said will; and after disposing of certain portions of his said real estate to certain uses, he authorized his said executors either to hold the residue, in which is included the premises so conveyed as aforesaid to the said John Savage, or to settle it in the names of trustees, to be selected by them upon certain trusts in the said will mentioned, and with such powers of sale, lease, and improvement, as they might deem expedient for the more profitable management of the said estate; which said will was, after the death of the said John Savage, duly proved by William Miller and George Rundle, two of the said executors and devisees in trust: and the said William Miller and William J. Bell having departed this life, and the said George Rundle being desirous that the said residue should be settled in the names of two trustees, of whom he should be one, and having selected to act in conjunction with himself for that purpose William Griffiths, of the city of Philadelphia, did, for the purpose of vesting the said residue in himself and the said William Griffiths, as trustees in conformity with said will, by deed bearing date the nineteenth day of December, one thousand eight hundred and forty-two, convey the said residue, including the premises so conveyed as aforesaid to the said John Savage, with all the privileges and appurtenances thereto belonging, to John W. Ashmead, his heirs and assigns, to hold the same in trust to convey the same immediately to the said George Rundle and William Griffiths, their heirs, executors, administrators, as joint tenants and not as tenants in common, and in trust for the uses and purposes set forth in said deed, and also in the will of the said John Savage, deceased; and the said John W. Ashmead, by deed of the same date, conveyed the same to the said George Rundle and William Griffiths, to hold the same in trust for the uses and purposes set forth in the said will; as by the said several acts, wills, judgments, executions, conveyances and assurances, reference thereunto being had,

will more fully appear; by virtue of which said several acts, wills, judgments, executions, conveyances and assurances, the said George Rundle and William Griffiths, trustees as aforesaid, became and were and are the assignees of the said Adam Hoops, and of his heirs and executors, and as such assignees entitled by the permission, authority, and grant, as well of the State of Pennsylvania as of the State of New Jersey, to the privilege of the said dam, and to maintain, raise, and repair the same for the use of the said mills and water-works, and entitled to the free and uninterrupted use and enjoyment of the water of the said Delaware river for the benefit of the said mills and water-works, and to such additional flow thereof as might be caused by the erection and maintenance of said dam, without diminution or alteration, by or from the acts of the State of Pennsylvania, or of the State of New Jersey, or either of them, or of any person or persons claiming under them or either of them, or of any other person or persons whomsoever; the said dam being the same that was erected by the said Adam Hoops.

And being so entitled, the said plaintiffs, before and at the time of committing the grievances hereinafter mentioned, of right had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of the said river, which during all that time ought to have run and flowed, and still of right ought to run and flow, unto the said mills and water-works of the said plaintiffs, for the supply of the same with water, as well by the natural flow and current of the said river, as by the erection and maintenance of the said dam, to wit, at Trenton aforesaid, in the district aforesaid. Yet the said defendants, well knowing the said premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the use and enjoyment of the said water of the said river, and to damnify them in the same, to wit, on the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-two, at Trenton aforesaid, in the district aforesaid, wrongfully and injuriously erected, and caused and procured to be erected, in, over, and across the said river, above the said mills and works of the said plaintiffs, a certain weir or dam of the height of ten feet, and of the length of one half mile; and also placed and caused to be placed in the said river, and above the mills and other works of the said plaintiffs, divers large quantities of stone, timber, and other materials, and wrongfully and injuriously kept and continued the same, so erected and placed, for a long space of time, to wit, from thence hitherto.

And then and there wrongfully and injuriously cut, dug, and made, and caused to be cut, dug, and made, in or out of the northerly side or bank of the said stream or river Delaware, above the mills and water-works of the said plaintiffs, and commencing at or near the said dam of the said defendants, so that the waters of the said stream might flow therein, one sluice, cut, or canal, of great depth, width and length, to wit, of the depth of ten feet, and of the width of one hundred feet, and of the length of thirty miles; and did also cut, dig, and continue, or extend the said sluice or canal beyond the said northerly bank or side of

said stream, northwardly for a great distance, to wit, for the distance of fifty miles, and southwardly for a great distance, to wit, for the distance of ten miles; and have wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluice or canal so cut and dug as aforesaid, for a long space of time, to wit, from thence hitherto. And in cutting, digging, and erecting the said canal on the said northerly bank of the said stream or river Delaware, above the works and mills of the said plaintiffs, divers streams and brooks, which always theretofore had run and emptied themselves into the said river Delaware, and been tributary thereto, did altogether divert and cut off, so that the same were, and from thence hitherto have been, altogether hindered and prevented from flowing into the said river Delaware, as they had always theretofore been accustomed to do. And also, at or near the head or commencement of the said sluice or canal, and where the same receives its supply of water from the said river Delaware, and immediately above the said dam or obstruction so erected and created by the defendants as aforesaid, did dig out and excavate, and cause to be dug out and excavated, to a great depth, to wit, to the depth of twelve feet, the bed of the said stream or river Delaware, and thereby turned and diverted a large quantity of the water of the said stream into the said sluice or canal, and have continued the same from thence hitherto, to wit, at Trenton aforesaid, in the district aforesaid.

Whereby, and by means of the said premises, the said defendants for a long space of time, to wit, from thence hitherto, have wrongfully and unlawfully diminished the usual flow of the said river, and turned divers large quantities of water of the said river out of the same, and away from the said mills and manufacturing establishments of the said plaintiffs, and prevented the same from flowing down to the mills and other works of the said plaintiffs, in as ample and beneficial a manner as the same would otherwise have flowed. And have unlawfully and injuriously taken and used the said water, so diverted as aforesaid, as well for the purpose of a certain canal constructed by the said defendants, as for the erection of a water power, from which they have supplied and still do supply, various mills, manufactories and other establishments, with water, for compensation and gain, deriving from thence great emolument and profit.

In consequence whereof the said plaintiffs were, and from thence hitherto have been, and still are, prevented from using their said mills and other works as they otherwise would have done; and have lost great profit for want of the supply of water which they are of right entitled to have; and were obliged to lay out and expend a large sum of money, to wit, the sum of ten thousand dollars, in maintaining and repairing the said dam, so erected as aforesaid by the said Adam Hoops, to wit, at Trenton aforesaid.

Wherefore the said plaintiffs say that they are injured, and have sustained damage, to the amount of one hundred thousand dollars, and thereof they bring suit, &c.

P. D. VROOM,
Att'y of the pl'ffs.

DISTRICT OF NEW JERSEY, *ss :*

George Rundle and William Griffiths, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, put in their place Peter D. Vroom, their attorney, against the Delaware and Raritan Canal Company, a corporation created by the State of New Jersey, and exercising its power within the said State, in a plea of trespass on the case.

Filed March 7th, 1848.

Demurrer to amended fifth count.

THE DELAWARE and Raritan Canal Company } ads.
GEORGE RUNDLE and William Griffiths, trustees of the estate of John Savage, deceased. }

And the said defendants, by their attorney, James S. Green, come and defend the wrong and injury, when, &c., and say that the said amended fifth count of the said declaration of the plaintiffs, and the matters and things therein contained in manner and form as the same are therein stated and set forth, are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action thereof against them, the said defendants ; and that they, the said defendants, are not bound by the laws of the land to answer the same, and this they are ready to verify. Wherefore, for want of a sufficient amended fifth count of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them. And the said defendants, according to the form of the statute in such cases made and provided, state and show to the court here the following causes of demurrer to the said amended fifth count of the said declaration, that is to say, that the act of the legislature of the then Province of Pennsylvania, passed March ninth, in the year of our Lord one thousand seven hundred and seventy-one, and the act of the then Province of New Jersey, passed December twenty-first, in the year of our Lord one thousand seven hundred and seventy-one, as set forth in said amended fifth count, do not vest in the said Adam Hoops, or in his heirs or assigns, the right and privilege to the use of the water of the river Delaware without diminution or alteration, by or from the act of the then Province now State of Pennsylvania, or of the then Province now State of New Jersey, or of any person or persons claiming under either of them, or of any person or persons whomsoever, as averred in the said amended fifth count of the said declaration. And also, for that it does not appear from the said amended fifth count, that the same George Rundle and William Griffiths are entitled to the right and privilege to the use of the water of the river Delaware, in manner and form as they have averred in the said amended fifth count of their declaration.

And also that as it appears from the said amended fifth count that the said river Delaware is a common highway and a public navigable river,

over which the States of Pennsylvania and New Jersey have concurrent jurisdiction, and a boundary of said States, these defendants insist that the legislative acts of the then province of Pennsylvania and New Jersey, passed in the year of our Lord seventeen hundred and seventy-one, as set forth in the said amended fifth count, were intended to declare the said river Delaware a common highway, and for improving the navigation thereof, and that the provision therein contained, as to the mill dam erected by Adam Hoops, in the said river Delaware, did not and does not amount to a grant or conveyance of water power to the said Adam Hoops, his heirs, or assigns, or to a surrender of the public right in the waters of the said river, but to a permission only to obstruct the waters of the said river by the said dam, without being subjected to the penalties of nuisance; that the right of the said Adam Hoops was, and that of his assigns is, subordinate to the public right at the pleasure of the legislature of Pennsylvania and New Jersey, or either of them.

And also that the said amended fifth count of the said declaration is in other respects uncertain, informal, and insufficient.

Filed May 17, 1848.

Joinder in demurrer.

GEORGE RUNDLE and William Griffiths, trustees of the estate of John Savage, deceased,
vs.
THE DELAWARE and Raritan Canal Company.

And the said George Rundle and William Griffith, trustees of the estate of John Savage, deceased, plaintiffs as aforesaid, say that the replication of the said plaintiffs to the plea of the said defendants, fifthly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to show that the court here have jurisdiction of the several injuries complained of in the declaration of the said plaintiffs, and this they are ready to verify. Wherefore they pray judgment, and that the court here may take cognisance of the plea aforesaid, and that the said defendants may answer over, &c.

PETER D. VROOM,
Attorney of plaintiffs.

Filed September 14, 1848.

Circuit court, U. S., New Jersey, March term, 1849.

GEORGE RUNDLE and William Griffiths, trustees, &c., citizens of the State of Pennsylvania,
vs.
THE DELAWARE and Raritan Canal Company.
In case.

At which day before the said circuit court at Trenton, came as well the said plaintiffs as the said defendants, by their attorneys aforesaid.

Whereupon all and singular the premises being seen and by the court

here fully understood, and mature deliberation being thereupon had, it appears to the said court that the plea of those the said plaintiffs pleaded by way of replication to the plea of the defendants fifthly above pleaded to the plaintiffs' declaration, and the matters therein contained, are sufficient in law to show that the court here have cognisance of the plea aforesaid. Thereupon it is considered that the said defendants further answer the said plaintiffs to their bill and declaration aforesaid.

And therefore, &c., on motion of

P. D. VROOM, *Att'y of plff's.*

THE DELAWARE AND RARITAN Canal Company ads. GEORGE RUNDLE AND WILLIAM GRIFFITHS, trustees. } In case.

Upon all and singular the premises being seen and by the court now here fully understood, and mature deliberation had thereupon, it appears to the said court here that the said second and third pleas above pleaded by the said defendants in manner and form aforesaid, and the matters therein contained, are sufficient in law to bar said plaintiffs from having or maintaining their said action against the said defendants, as set forth in the first, second, third, and fourth counts of the said declaration of the said plaintiffs; and that the said amended fifth count of the said plaintiffs, and the matters and things therein contained, are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action thereof against them, the said defendants. Therefore, it is considered that the said plaintiffs take nothing by their said suit, and that the said defendants do go thereof without delay.

On motion of JAMES S. GREEN, *Att'y of deft's.*

Supreme Court of the United States.

GEORGE RUNDLE and William Griffiths, trustees of the estate of John Savage, deceased, citizens of the State of Pennsylvania, vs. THE DELAWARE and RARITAN Canal Company, a corporation created by the State of New Jersey, *ss.*

Assignment of errors.

And the said plaintiffs, by Peter D. Vroom, their attorney, come before the court and say, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error, in this, that by the record it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants, when by the

over which the States of Pennsylvania and New Jersey have concurrent jurisdiction, and a boundary of said States, these defendants insist that the legislative acts of the then province of Pennsylvania and New Jersey, passed in the year of our Lord seventeen hundred and seventy-one, as set forth in the said amended fifth count, were intended to declare the said river Delaware a common highway, and for improving the navigation thereof, and that the provision therein contained, as to the mill dam erected by Adam Hoops, in the said river Delaware, did not and does not amount to a grant or conveyance of water power to the said Adam Hoops, his heirs, or assigns, or to a surrender of the public right in the waters of the said river, but to a permission only to obstruct the waters of the said river by the said dam, without being subjected to the penalties of nuisance; that the right of the said Adam Hoops was, and that of his assigns is, subordinate to the public right at the pleasure of the legislature of Pennsylvania and New Jersey, or either of them.

And also that the said amended fifth count of the said declaration is in other respects uncertain, informal, and insufficient.

Filed May 17, 1848.

Joinder in demurrer.

GEORGE RUNDLE and William Griffiths, trustees of the estate of John Savage, deceased,
vs.
THE DELAWARE and Raritan Canal Company.

And the said George Rundle and William Griffith, trustees of the estate of John Savage, deceased, plaintiffs as aforesaid, say that the replication of the said plaintiffs to the plea of the said defendants, fifthly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to show that the court here have jurisdiction of the several injuries complained of in the declaration of the said plaintiffs, and this they are ready to verify. Wherefore they pray judgment, and that the court here may take cognisance of the plea aforesaid, and that the said defendants may answer over, &c.

PETER D. VROOM,
Attorney of plaintiffs.

Filed September 14, 1848.

Circuit court, U. S., New Jersey, March term, 1849.

GEORGE RUNDLE and William Griffiths, trustees, &c., citizens of the State of Pennsylvania,
vs.
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At which day before the said circuit court at Trenton, came as well the said plaintiffs as the said defendants, by their attorneys aforesaid.

Whereupon all and singular the premises being seen and by the court

here fully understood, and mature deliberation being thereupon had, it appears to the said court that the plea of those the said plaintiffs pleaded by way of replication to the plea of the defendants fifthly above pleaded to the plaintiffs' declaration, and the matters therein contained, are sufficient in law to show that the court here have cognisance of the plea aforesaid. Thereupon it is considered that the said defendants further answer the said plaintiffs to their bill and declaration aforesaid.

And therefore, &c., on motion of

P. D. VROOM, *Att'y of plff's.*

THE DELAWARE AND RARITAN Canal Company ads. GEORGE RUNDLE AND WILLIAM GRIFFITHS, trustees. } In case.

Upon all and singular the premises being seen and by the court now here fully understood, and mature deliberation had thereupon, it appears to the said court here that the said second and third pleas above pleaded by the said defendants in manner and form aforesaid, and the matters therein contained, are sufficient in law to bar said plaintiffs from having or maintaining their said action against the said defendants, as set forth in the first, second, third, and fourth counts of the said declaration of the said plaintiffs; and that the said amended fifth count of the said plaintiffs, and the matters and things therein contained, are not sufficient in the law for the said plaintiffs to have or maintain their aforesaid action thereof against them, the said defendants. Therefore, it is considered that the said plaintiffs take nothing by their said suit, and that the said defendants do go thereof without delay.

On motion of JAMES S. GREEN, *Att'y of deft's.*

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